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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1092 101

KEESHIN MOTOR EXPRESS CO., INC.,
A CORPORATION,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Keeshin Motor Express Co., Inc., an Illinois corporation, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in this cause, entered March 15, 1943, affirming an order of the District Court of the United States, Northern District of Illinois, Eastern Division, that confirmed an injunctive decree previously entered by the same court. The decision here requested to be reviewed is reported in 134 F. 2d 228 and is printed in the Transcript of Record, page 73.

Jurisdiction.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 15, 1943 (R. 73). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, paragraph 347 (a)).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

(a) Nature of the Proceedings.

The Interstate Commerce Commission on June 25, 1941 filed a Complaint (R. 2) in the District Court below alleging violation by the Petitioner of Sections 217 (b) and 222 (c) of Part II of the Interstate Commerce Act and demanded judgment which would perpetually and permanently enjoin and restrain the Petitioner and its officers, directors, agents, employees, representatives and others from charging, demanding, collecting or receiving a less charge and compensation for the transportation of property for the general public in interstate commerce over its lines and routes and on public highways of the United States, and in particular on public highways between Chicago, Illinois, and East St. Louis, Illinois, via St. Louis, Missouri, than the rates and charges shown in the Petitioner's tariffs duly filed with the Commission. The Complaint also asked that the injunctive decree restrain the Petitioner and its officers, agents, representatives and others from offering, granting or giving concessions in respect to the transportation of property for the general public over its lines and routes and on public highways between Chicago, Illinois and East St. Louis, Illinois, via St. Louis, Missouri, and between points shown in Petitioner's tariffs. An Answer to the Complaint was filed (R. 11).

In the trial of the case all of the facts were submitted by written stipulations between the parties (R. 14 and 48). All of the facts and the evidence that established such facts had to do solely with transportation of property by the Petitioner between Chicago and other points in Illinois,

on the one hand, and East St. Louis, Illinois, on the other hand, through St. Louis, Missouri. No facts pertaining to transportation between points in any state other than the points as indicated in Illinois were established, and, further, no evidence was received or offered pertaining to any transportation between points in any other state.

After the trial court had heard the entire case, including argument of counsel, and had announced its decision to the effect that the prayer of the Commission's Complaint should be allowed and an injunctive decree would issue, the Commission, in an attempt to agree on the form of the judgment entry, proposed that the injunction be made to cover not only transportation between points within the State of Illinois through St. Louis, Missouri, but also transportation between points in *any state* through *any other state*. After further consideration the trial court indicated that on the evidence the Commission was entitled to an injunction in the form and as broad as it was requesting, provided the Complaint was sufficiently broad. The trial court further indicated at the same time that the Complaint as originally filed was not broad enough and stated that leave would be given the Commission, if it so desired, to amend the Complaint. The Complaint was amended (R. 29) and the broad decree as requested by the Commission was entered by the District Court (R. 36), further confirmed by order of the same court (R. 58) and affirmed in all respects by the Circuit Court of Appeals (R. 73).

(b) Statement Concerning Petitioner and Pertinent Provisions of the Act.

Petitioner, Keeshin Motor Express Co., Inc., an Illinois corporation, with its principal and general office at Chicago, Illinois, is a common carrier of property by motor vehicle as defined in Section 203 (a) (14) of Part II of

the Interstate Commerce Act (U. S. Code, Supp. 1, Title 49, Sec. 303 (a) (14)) and as such is required to publish and file with the Interstate Commerce Commission, tariffs showing all the rates and charges in lawful money of the United States for transportation, and all services in connection therewith. (Sec. 217 (a) of the Act, 49 U. S. C. 317(a).)

The Act provides that such carriers cannot deviate from their tariffs as filed and no such carrier shall charge, or demand, or collect, or receive a greater, or less, or different compensation for transportation than the rates and charges specified in the tariffs in effect at the time. (Sec. 217 (b) of the Act, 49 U. S. C. 317 (b).)

The Act provides that if any carrier violates certain of its provisions, including those involved here, the Commission may apply to a proper District Court of the United States for enforcement of such provisions and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction restraining such carrier from further violation. (Sec. 222 (b) of the Act, 49 U. S. C. 322 (b).)

The Act also provides that anyone who shall *knowingly and wilfully* assist, suffer or permit anyone to obtain transportation of property subject to the Act for less than the applicable rate or charge shall be deemed guilty of a misdemeanor and upon conviction subject to a fine. (Sec. 222 (c) of the Act, 49 U. S. C. 322 (c).)

The Petitioner operates in twelve states in the conduct of its business, of which Illinois is one. Rates and charges of such carriers for transportation service in intrastate commerce are regulated and prescribed pursuant to law in some of said states and not in others. The rates and charges of such carriers in intrastate commerce are not so regulated and prescribed in the State of Illinois.

The Question Presented.

The single question presented may be stated as follows:

1. Was the issuance of a permanent injunction, unrestricted in territorial scope applying throughout all twelve states in which the Petitioner operates, justified when the original complaint and all of the evidence of record was limited to instances of transportation between points in only the State of Illinois through St. Louis, Missouri.

A significant aspect of the question, as here stated and presented by the Petitioner, is whether or not the trial court was justified in granting leave to amend the Complaint after indicating what its judgment would be, where no evidence was introduced to justify such amendment.

The petitioner does not here contend that no injunction whatever should issue insofar as the State of Illinois is concerned, particularly in connection with instances of transportation between Chicago and other points in the State of Illinois, on the one hand, and East St. Louis, Illinois, on the other hand, through St. Louis, Missouri.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

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1. The decision of the Circuit Court of Appeals in the instant case is in conflict with principles laid down in other decisions of the same Court and decisions of other Circuit Courts of Appeals and decisions of the Supreme Court of the United States.

In the instant case the territorial scope of the injunctive decree is the essence of the question involved. The lack of any evidence whatsoever pertaining to the activities of the petitioner in eleven of the twelve states involved raises a question that is most pertinent in all injunctive decrees and that is the broadness of their application. Where activities of the petitioner complained of in some segregated part of a broad territory have not been shown to be similar to activities of the petitioner in other parts of the territory, the territorial scope of the application of the decree is encompassed with the question of broadness, particularly where the effect of the decree goes beyond the territory wherein the evidence or actual activities complained of are confined. The principles laid down in the same Circuit Court of Appeals by its decision in the case of *Commonwealth Edison Company* v. *National Labor Relations Board*, Docket No. 8190, decided May 22, 1943, and dealing with the scope and broadness of an order to cease and desist is in conflict with its decision in this case. The *Commonwealth* case is unreported; however, a copy has been filed with the Clerk of the Supreme Court of the United States. It is also in conflict with the decision by the same Court in the case of *National Labor Relations Board* v. *Swift & Co.*, 108 F. (2d) 988, also, the decision of the Circuit Court of Appeals for the Eighth Circuit in *Southern*

Pac. Co. v. *Colorado Fuel & Iron Co., et al.*, 101 Fed. 779, also decisions of the Supreme Court of the United States in *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, and *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426. All of said decisions deal with the broadness of the application and effect of injunctive decrees.

2. The decision of the Circuit Court of Appeals substitutes penalties for contempt of Court—fine and imprisonment—for the statutory penalty of a fine only throughout a territory comprised of eleven large states of the United States where petitioner operates with no evidence whatsoever as to any violation of the statute and no evidence of activities similar to those complained of in any of said eleven states.

An inadvertent and human error made by any of the many representatives and employees of the petitioner in connection with the petitioner's business and activities in assessing charges on a shipment moving between points in any one of said eleven states through another state would subject the petitioner and such representatives and employees to the fines and penalties of the restraining order. Such fines and penalties could well result from minor and wholly inadvertent departures from tariff provisions in any or all of the states in which petitioner operates where it renders transportation service between points in one state through another state although the evidence of such departures that was used in support of the issuance of the injunctive decree relates solely to a single state.

3. The United States Circuit Court of Appeals for the Seventh Circuit has decided a question of substantive law relating to the construction and application of the rate and tariff regulatory provisions of Part II of the Interstate Commerce Act, which has not been, but should be, settled by this Court.

The proper interpretation of the question is of general importance to all common carriers by motor vehicle, such as the petitioner, and all officers, directors, agents, employees, representatives, and all others acting by or under the direction or authority of such common carriers throughout the United States. The decree does not deal with a violation of the statute in connection with petitioner's right to conduct its business or operate its trucks over certain routes and highways and between certain points but rather with deviations from compilations of rates and charges as set forth and filed in published tariffs as required by statute. Circumstances and conditions that would bring about deviation from such rates and charges might exist in some particular limited place or portion of a broad territory but such circumstances and conditions may not exist in other parts of such broad territory, and, if they did exist, they may not bring about deviation from such rates and charges. There should be a final decision in this case to aid and assist in establishing a controlling principle or policy in the administration of the statute as it pertains to tariff requirements to be complied with by carriers subject to the statute, particularly in connection with the broad application and territorial scope encompassed by injunctive decrees prohibiting deviation from tariff provisions that are not in themselves part of the statute, but are filed, published and given effect pursuant to the statute and administrative rules and regulations thereunder.

The petitioner has abandoned its contention that under

the facts of record no injunction whatever should issue to compel compliance with its published tariffs insofar as the State of Illinois is concerned, particularly between Chicago and other points in the State of Illinois, on the one hand, and East St. Louis, Illinois, on the other hand, through St. Louis, Missouri. Its Petition is directed solely at the breadth and scope of the injunction in a territorial sense. The Interstate Commerce Commission has instituted many proceedings throughout the country to compel compliance with tariffs by injunctive decree rather than to invoke the provisions of the statute for nonobservance of tariffs. The decision in this case is one of not only importance to the petitioner but to the entire common carrier transportation industry insofar as the pertinent rate and tariff provisions of Part II of the Interstate Commerce Act are concerned. According to records of the Interstate Commerce Commission, there are several thousand of such carriers throughout the United States.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of your Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and send to this Court for its review on a day certain to be therein named a full and complete transcript of the record and proceedings in the case numbered and entitled on said United States Circuit Court of Appeals' docket No. 8059, *Interstate Commerce Commission, Plaintiff-Appellee*, v. *Keeshin Motor Express Co., Inc., a corporation, Defendant-Appellant*, and that the decision of said United States Circuit Court of Appeals affirming the order and decree of the District Court of the United States, Northern District of Illinois, Eastern Division, as entered by said District Court of the United States in said case, be modified and reversed insofar as it has to do with the transportation of property by motor vehicle in interstate or foreign commerce over petitioner's lines and routes and

on public highways between places in any state through another state other than between places in the State of Illinois through another state, and that your petitioner have such other and further relief in the premises as to your Honorable Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, here requested to be reviewed, is reported in 134 F. 2d 228 and is printed in the Transcript of Record, page 73. The injunctive decree and order (confirming the decree) of the District Court of the United States, Northern District of Illinois, Eastern Division, is printed in the Transcript of Record, pages 36 and 58, respectively.

Jurisdiction.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 15, 1943 (R. 73). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, paragraph 347 (a)).

Statement of the Case.

The essential facts of the case are fully stated in the accompanying Petition for Writ of Certiorari under the title of "Summary and Short Statement of the Matter Involved" and will not be repeated here.

The Law.

The pertinent and applicable sections of Part II of the Interstate Commerce Act are referred to and briefly explained in the accompanying Petition for Writ of Certiorari

under the heading of "Statement Concerning Petitioner and Pertinent Provisions of the Act" and will not be further referred to or dealt with here.

Specifications of Errors.

Petitioner makes the following assignment of errors:

1. The United States Circuit Court of Appeals for the Seventh Circuit in affirming the injunctive decree entered by the District Court of the United States, Northern District of Illinois, Eastern Division, erred in not modifying said injunctive decree to cover only instances of transportation and have effect in only the territory wherein such instances of transportation occurred, and limiting the application and effect of said decree to only such instances of transportation and the territory in which they occurred in accordance with the evidence of record.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in not holding that the complaint was improperly amended after trial of the case and an announcement of the decision by the District Court of the United States, because such amendment was broader than and did not conform to evidence of record.

SUMMARY OF ARGUMENT.

1. To subject the petitioner to the constant threat of contempt proceedings should it at any time in any part of the broad territory, other than that limited part to which the evidence is confined, inadvertently move a shipment between two points in one state through another state and assess a rate or charge that deviates in some slight manner from the proper rate or charge, is a gross deprivation of its right to due process of law and would improperly subject the petitioner to the obloquy and pains and penalties of the restraining order.

2. The issues upon which the case was tried had to do with shipments handled by petitioner between East St. Louis, Illinois and other points in Illinois through St. Louis, Missouri under facts and circumstances that obtained in the handling of such shipments and clearly did not have to do with shipments handled between points in other portions of the broad territory. There was no basis to suggest and grant leave to amend the complaint, especially for the purpose of supporting a broad territorial application of an injunction beyond that territory covered by the evidence.

ARGUMENT.

1. The injunctive decree should have been modified to cover only instances of transportation and have effect in only territory wherein such instances of transportation occurred and its application and effect should have been limited to only such instances of transportation and the territory in which they occurred in accordance with the evidence.

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, the Court had enjoined the Chesapeake & Ohio railroad from violating prohibitions of the Interstate Commerce Act against undue preferences and discriminations. The Chesapeake & Ohio was selling coal to the New Haven road at prices which did not permit the Chesapeake & Ohio its published rates of transportation. The trial court held there were no violations of the provisions of the second and sixth sections of the Act to Regulate Commerce but that the contracts amounted to an undue discrimination and violation of the third section of the Act (49 U. S. C. 2, 3, 6). The trial court denied a request made by the Commission that the injunction be expanded so as in general terms to command the Chesapeake & Ohio perpetually to observe in the future its published rates. The Supreme Court modified the injunction and enlarged it by enjoining the Chesapeake & Ohio from taking less than the freight rates fixed in its published tariff by means of dealing in the purchase and sale of coal. As to the cross-appeal of the Commission contending that the Court should have enjoined the Chesapeake & Ohio from transporting coal from one state to or through any other state for the

New Haven or for any person at a less rate than the duly established freight rate in force at the time, and from further failing to observe its published tariffs or from giving to any person any undue or unreasonable preference or advantage, Mr. Justice White, speaking for the unanimous court, said (page 404):

> "The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

In *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426, 85 L. Ed. 930, the Court cited with approval the *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 50 L. Ed. 515, and held (pages 435-436):

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. Ed. 518, 25 S. Ct. 276; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404, 50 L. Ed. 515, 526, 26 S. Ct. 272, and see under the *National Labor Relations Act, National Labor Relations Bd.* v. *Swift & Co.,* (C. C. A. 7th), 108 F. (2d) 988.
>
> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See *e. g.,*

H. J. Heinz Co. v. *National Labor Relations Bd. No. 73*, decided January 6, 1941 (311 U. S. 514, *ante*, 309, 61 S. Ct. 320)."

As the petitioner has stated on page 6 of its Petition for Writ of Certiorari, its activities complained of in some segregated part of a broad territory have not been shown to be similar to activities of the petitioner in other parts of the territory and the territorial scope of the application of the decree is encompassed with the question of broadness, particularly where the effect of the decree goes beyond the territory wherein the evidence or actual activities complained of are confined.

The petitioner, on the same page of its Petition, pointed out the *Commonwealth Edison Company* case recently decided by the United States Circuit Court of Appeals for the Seventh Circuit, wherein the principles laid down in the *Express Publishing Company* case, which are in conflict with its decision in the instant case, were again upheld.

In *National Labor Relations Board* v. *Swift & Co.*, 108 F. (2d) 988, the Circuit Court of Appeals for the Seventh Circuit struck from an order of the Labor Relations Board a provision which required the defendant to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the right guaranteed them under Section 7 of the Act (29 U. S. C. 157). As to that, the Court said (page 990):

> "*Paragraph 1(b) of the order:* The Board was not warranted, however, in enjoining respondent from committing any act which might constitute a violation of Sec. 7 of the Act. In truth, the conduct enjoined has no fair relation to the issue which was heard and determined by the Board. The action of the Board in this respect was neither necessary nor proper under the facts and circumstances. The order is too broad."

Another portion of the order of the Board was found to be proper. In dealing with varying conditions the Court said (page 990):

> "As the remedy varies from case to case, so an order too broad in one case may be too narrow in another. In the last analysis of things, the propriety of an order depends on the facts of the case itself, and consideration is to be given to the complaint, the findings, and the character of the unlawful conduct—in short, consideration is to be given to all the facts and circumstances."

The facts on which the Board issued its order, which included the paragraph found by the court to be proper, deals with facts and circumstances set forth in *Swift & Co.* v. *National Labor Relations Board*, 106 Fed. (2d) 87. By referring to the statement of the case therein, it can be seen that the facts and circumstances pertain to a master and servant relationship having to do with a packing plant of the master situated at Denver, Colorado, and alleged unfair labor practices carried on by certain managers and supervisors in charge of that particular plant who used coercive methods to compel the employees to join a company dominated union. The master had been ordered to cease and desist from interfering with the company dominated union. The managers and supervisors apparently continued in their attempt to exercise control over and to influence the employees of the particular plant and interfere with the affairs of this particular local union and a petition for an enforcement of its order was filed against Swift & Co. by the National Labor Relations Board. Under such facts and circumstances, it can readily be seen how a court on being petitioned for injunctive relief would hold such portion of an order of the Board as being proper where the master was ordered to cease and desist from controlling and influencing the employees of a particular plant at a particular place through a particular labor organization (employer controlled) or "any

other labor organization." It is noteworthy that the court did not permit that portion of the order of the Board to stand which would have applied, through injunctive relief, to master and servant relationships at other plants in other states, or for that matter any plant in the one state other than the one involved. In view of the facts and circumstances, all as summarized above, it appears that the decision in the *Swift & Co.* case supports the petitioner's position in the instant case.

In *Southern Pac. Co.* v. *Colorado Fuel & Iron Co., et al.*, 101 Fed. 779, the Circuit Court of Appeals, Eighth Circuit, reversed a decree which provided, in part, that the defendants be enjoined from further continuing to violate and disobey the Interstate Commerce Act. In discussing this phase of the injunctive order, the Court states at page 785:

> "Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, * * *."

To subject the petitioner in the instant case to the constant threat of immediate contempt proceedings should it at any time inadvertently move a shipment between two points in any state through an adjoining state at an improper rate is a gross deprivation of its right to due process of law.

The burden of producing evidence in support of alleged violations of the Interstate Commerce Act is upon the Commission, and, where no such evidence is produced as to points in any states other than Illinois, there is no basis for an injunctive order as broad as that entered by the

District Court and affirmed by the Circuit Court of Appeals, and certainly it is not the duty of the petitioner to produce negative evidence of freedom from such violations in order to liberate itself from an all-inclusive restraining order.

2. The Complaint was improperly amended after trial of the case and an announcement of the decision by the trial court, because such amendment was broader than and did not conform to the evidence of record.

It is ordinarily within the sound discretion of the Court at any time to permit an amendment *to conform to the proof* where evidence has been introduced. We do not have such a situation here because there is not a scintilla of evidence in the record, nor was any proposed to be offered, that would support the broad amendment or the broad application of the judgment as indicated by the trial court before the Amended Complaint was filed by the Commission.

In *Simms* v. *Andrews,* 118 F. (2d) 803, where error was assigned on a ruling vacating an order setting aside a judgment in order to permit amendment of a reply to an intervening petition to make it *conform to the proof adduced at the trial,* the Circuit Court of Appeals for the Tenth Circuit, in reference to Rule 15 (b) (Rules of Civil Procedure for the District Courts of the United States, 28 U. S. C. foll. 723c) stated (page 807):

> "It is ordinarily within the sound discretion of the trial court to permit an amendment to conform to the proof *where evidence has been introduced without objection* as to facts not presented, or insufficiently presented, by the pleadings. The right to amend pleadings to conform to the proof proceeds upon the theory that by such amendment the pleadings are brought in line with the actual issues upon which the case was tried, even though such issues were not stated in the pleadings as originally drawn. In such case it is the

duty of the court, *after the evidence upon the supposed issue has been introduced* without objection, to permit the amendment." (Italics ours.)

In the case here at bar, there was no evidence before the trial court to support the broad amendment when leave was granted to file the Amended Complaint nor was any received or even offered at any time after the Amended Complaint was filed. It is obvious that there was no basis to suggest and grant leave to amend the complaint, especially for the purpose of supporting a broad territorial application of an injunction beyond only that territory which was encompassed by the evidence. In order to say that there was evidentiary basis for the amendment or the broad territorial application of an injunction beyond only the territory wherein all of the instances of transportation occurred that were in any way dealt with in the evidence, it would be necessary to assume that the facts and circumstances pertaining to shipments that the petitioner may handle between points in other states through another state resemble and are similar to the facts and circumstances under which the petitioner handles shipments between East St. Louis, Illinois, and other points in Illinois through St. Louis, Missouri, notwithstanding that the record reveals nothing concerning the handling of shipments in the other portions of the broad territory.

Conclusion.

It is respectfully urged that, in the light of the above authorities and the evidence of record in this proceeding, it was error for the United States Circuit Court of Appeals for the Seventh Circuit to affirm the broad application of the injunctive decree entered by the District Court of the United States, Northern District of Illinois, Eastern Division. The United States Circuit Court of Appeals for the Seventh Circuit erred in not modifying the injunctive

decree to cover only instances of transportation and have effect in only the territory wherein such instances of transportation occurred, and should have limited the application and effect of the decree to only such instances of transportation and the territory in which they occurred in accordance with the evidence of record. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Affidavit of Service.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

FLOYD F. SHIELDS, being duly sworn, on oath deposes and says that he is one of the attorneys of record for Keeshin Motor Express Co., Inc., Petitioner, and that he served a copy of the above Petition for Writ of Certiorari and Brief in Support Thereof upon Colin A. Smith, one of the attorneys of record for the Interstate Commerce Commission, Respondent, by personally delivering said copy into his hands at his office in Chicago, Illinois, on June 12, 1943.

FLOYD F. SHIELDS.

Subscribed and sworn to before me this 12th day of June, 1943.

KEITH C. BARTLETT,
(SEAL) *Notary Public.*

My commission expires December 22, 1945.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 101

KEESHIN MOTOR EXPRESS CO., INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 73–78) is reported in 134 F. (2d) 228. The memorandum opinion (R. 55–58) of the district court confirming its decree (R. 36–37) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 15, 1943 (R. 73). The petition for a writ of certiorari was filed on June 14,

1943.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the district court was justified in granting an injunction, unlimited in territorial scope, restraining particular statutory violations of like character with those found to have been flagrant in one district served by petitioner.

2. Whether the filing of the amended complaint should have been permitted.

STATUTE AND RULES INVOLVED

The pertinent provisions of the Interstate Commerce Act, Part II, and Rules 15 (b) and 15 (c) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra*, pp. 9–12.

STATEMENT

This cause arose on a complaint filed by the Interstate Commerce Commission on June 25, 1941 (R. 2), in the district court, seeking to enjoin petitioner, a common carrier by motor vehicle, from further departures in its published tariff rates on transportation "over its lines and routes and on public highways of the United States" (R. 5, 6). The alleged violations of Sections 217 (b) and 222 (c) of the Interstate Commerce Act, Part II

[1] There has been no service upon the Solicitor General, as provided for under Rule 38 (3) of this Court.

(*infra*, pp. 10, 11–12), concerned petitioner's charges on shipments from or to points in Illinois, to or from the East St. Louis, Illinois, area, all via St. Louis, Missouri, and therefore in interstate commerce (R. 2–4). Petitioner admitted the facts as to the violations by stipulating that out of a total of 2,144 shipments transported between the points involved, from October 8, 1940, to September 30, 1941, there were 648 shipments on which incorrect charges were assessed, of which 604 were undercharges (R. 14–16, 30–31, 39). On November 25, 1941, a hearing was held (see R. 32) on the stipulated facts (R. 14) and on the pleadings (R. 2, 11).

Thereafter, on December 2, 1941, the court indicated that judgment would be entered enjoining tariff departures on transportation between points in any one state through another state, provided that an amended complaint be filed in accordance therewith conforming to the evidence (R. 55). On December 3, the amended complaint (R. 29, 34) was submitted to the court, with motion for leave to file. On December 6, 1941, leave was granted to file the amended complaint instanter (R. 29), and on the same date the court entered its findings of fact, conclusions of law and judgment (R. 32–37), permanently enjoining petitioner from charging other than its effective tariff rates on transportation between places in any one state through another state. Petitioner contends that

the injunction should have been limited to the St. Louis area where the violations were shown.

On December 11, leave was granted to file an amended answer (R. 39, 43) and further hearing was ordered (see R. 55–56). On February 4, the parties filed a stipulation of additional facts (R. 48–54), and on March 9, 1942, argument was heard on various motions, and further hearing was held on the amended complaint and answer and on the two stipulations. On March 11, 1942, the court entered an order confirming its decree of December 6, 1941 (R. 55–58). This order was affirmed in all respects by the circuit court of appeals on March 15, 1943 (R. 73–79).

ARGUMENT

The decision of the court below is in conformity with well-established principles of law laid down by this Court, and with other decisions of the circuit courts of appeals. The right to injunctive relief being shown, relief effective in all respects to meet the particular facts and circumstances of the case is necessary and proper, and is required under the statute. *National Labor Relations Board* v. *Express Publishing Company,* 312, U. S. 426, 436, 437; *Local 167, I. B. T., etc.,* v. *United States,* 291 U. S. 293, 299; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 96; *New York, N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 405; *National Labor Relations Board* v. *Swift & Co.,* 108 F.

(2d) 988, 990 (C. C. A. 7); *Securities and Exchange Commission* v. *Lawson*, 24 F. Supp. 360, 365 (D. Md.).

1. The Interstate Commerce Act, Part II, Section 222 (b), *infra*, p. 11, provides for injunctive relief whenever operation by any motor carrier subject thereto is found to be "in violation of any provision of this chapter." By the uncontroverted facts found herein, there occurred 708 violations of Sections 217 (b) and 222 (c) of the Act in the St. Louis district, over a period of less than fifteen months, 60 of which occurred after this action was filed (R. 16, 49). This indicates, and the court so found, that there existed at least a "reasonable" probability that the unlawful practice would be continued unless enjoined (R. 35). The injunction granted is no broader than is necessary to restrain related acts of the same type as the extensive and repeated violations shown; it does not go outside the complaint, the evidence of record, and acts reasonably to be anticipated therefrom. Because of the great number of violations of a particular type proven in the St. Louis district, it is important that the injunction be adequate to restrain any acts of the same type, wherever they might occur.

The right of the Commission to obtain an injunction, and the scope of such injunction, should be judged in the light of the statute which pro-

vides for it. The intentions of the parties are immaterial on the question of concessions, rebates, and unlawful preferences, intent being imputed where the effect is a violation of the law. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 86; *New York, N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 398; *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch,* 204 Fed. 849, 852 (C. C. A. 6); *United States* v. *Northern Pac. Ry. Co.,* 18 F. (2d) 299, 304 (E. D. Wash.)

The extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. *United States* v. *Morgan,* 307 U. S. 183, 194; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552; *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Central Kentucky Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271. A federal court is not limited to the restraint of unlawful acts committed, but may restrain related acts of the same type or class if these may be fairly anticipated in the future. *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 435; *United States* v. *Union Pacific R. Co.,* 226 U. S. 61, 96; *Bitterman* v. *Louisville & N. R. Co.,* 207 U. S. 205, 227, 229; *New York, N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 405; *Swift & Co.* v. *United States,* 196 U. S. 375, 400, 401. The fact that evidence

of violations relates only to one geographical district does not mean that the disposition to violate is similarly limited.

2. The district court permitted the filing of the amended complaint in accordance with Rule 15 (b) of the Federal Rules of Civil Procedure in order that the relief warranted by the evidence might be granted. The court also permitted the filing of an answer to the amended complaint (R. 43), and after further hearing, and with a supplemental stipulation of facts before it which disclosed 60 further violations of the same character during the months October, November, and December of 1941 (R. 48–50), affirmed its decision of December 6, 1941. This allowance of the amendment and the issuance of a decree based thereon clearly did not, in the circumstances, constitute an abuse of the court's discretion.[2]

The answer to the amended complaint expressly admitted every allegation of fact concerning deviations from petitioner's published tariffs. The filing of the amended complaint was in precise consonance with the very purpose of Rule 15 (b), *i. e.*,

[2] The amended complaint was filed at the court's suggestion because of a controversy between counsel as to whether the first complaint was meant to encompass the St. Louis district alone (R. 74, 76). However, the original complaint requested relief unlimited to the St. Louis district (R. 5–6), and the filing of the amended complaint seems accordingly to have been an unnecessary formality.

to avoid unnecessary litigation and to obtain speedy adjudication upon facts encompassing all of the material issues before the court. Under Rule 15 (c) which furthers the same purpose, the amended complaint relates back in all respects to the date of the original pleading, upon which the stipulated facts were agreed by the parties. The decision in *Simms* v. *Andrews*, 118 F. (2d) 803 (C. C. A. 10), upon which petitioner relies (Pet. 20–21), deals with an entirely different situation and is not contrary to respondent's position.

CONCLUSION

The decision below is correct. It presents no conflict or question which warrants further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
ALLEN CRENSHAW,
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AUGUST 1943.

APPENDIX

Interstate Commerce Act, Part II, August 9, 1935, c. 498, 49 Stat. 543, as amended:

Section 203 (a) (49 U. S. C. 303 (a)) provides in part:

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

* * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 217 (49 U. S. C. 317) provides in part:

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs, showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce

between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1 (7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

* * * * *

Section 222 (49 U. S. C. 322) provides in part:

* * * * *

(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer, or permit any person or persons, nat-

ural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

* * * * *

Federal Rules of Civil Procedure:

Rule 15 (b):

Amendments to Conform to the Evidence.—When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the results of the trial of these issues.

* * * * *

Rule 15 (c):

Relation Back of Amendments.—Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

U. S. GOVERNMENT PRINTING OFFICE : 1943